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IN THE

# Supreme Court of The United States

OCTOBER TERM, 1963

NO. 60

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JAMES RUSSELL ROBINSON, JOSEPH PRICE PERKINS, MARVIN EDISON ROBINSON, THOMAS VAWN ROLAND, JAMES H. LANE, THOMAS WALTER GAITHER, BARRY M. COHEN, ANGELINE E. BUTLER, HENRY PRINGLE, BERNARD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETTE BAILEY, DOROTHY R. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, and DR. CARL ELLIOTT YAEGER, JR.,

Appellants,

—vs—

STATE OF FLORIDA,

Appellee.

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

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## BRIEF OF THE APPELLEE

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

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## BRIEF OF THE APPELLEE

---

### OPINION BELOW

Appellee concedes that the pertinent opinion involved in this case is that to be found in 144 So. 2d 811.

## JURISDICTION

Appellee concedes that appropriate jurisdiction to entertain this appeal is vested in this Court pursuant to 28 U.S.C. § 1257 (2).

## QUESTION PRESENTED

Appellee concedes that the question as posed by appellants in their brief at pages 2 and 3 thereof is substantially in conformity with the issue upon which this Court is asked to rule.

## STATEMENT OF THE CASE

Appellee accepts appellant's statement of the case as the same appears in their brief at pages 4 and 5 thereof only insofar as it reflects a true and correct resume of what the record below would, without conflict, reveal.

## SUMMARY OF ARGUMENT

The constitutional sanctions imposed and the actions inhibited by the Fourteenth Amendment result from and are applied to only such action as may fairly be said to be that of the states, to-wit: "state action." The Fourteenth Amendment poses no constitutional barrier against mere private conduct, however morally disgraceful, reprehensibly discriminatory or internationally wrong. Private invasions or deprivations of individual rights have not been, are not now, and should not ever become the subject matter to which the constitutional sanction embodied in the Fourteenth Amendment directs itself. **Shelley v. Kraemer,** 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836 (1948); **The Civil Rights Cases,** 109 U.S. 3, 27 L.Ed. 835, 3 S.Ct. 18 (1883).

An individual who happens to be the owner of purely private property, such as the operator of a restaurant may, without colliding with the Fourteenth Amendment, discriminate as to invitees who might wend their way into his establishment, even if such discrimination be arbitrary. The same would, of course, apply, whether the establishment were owned by a partnership or a corporation or some other business association. The private property owner, whatever his status, has the right, even though he operates his private restaurant by license from the state or one of its political subdivisions, to select those persons with whom he wishes to deal and to base such selection on any or no reason, if he so desires. **Williams v. Howard Johnson's Restaurant**, 268 F.2d 845 (4th Cir.).

Appellee observes that no individuals are possessed of any constitutional right either to enter upon private property contrary to the will of the owner thereof or to remain thereon after having been asked to depart the premises. Conversely the private owner of the premises is and should ever be entitled to the protection of law enforcement (for which he pays heavily through taxation) as an aid to maintaining the peaceful possession of his property if and when it becomes necessary in order to preserve that which must be his and his alone under any law. This very Court, when making reference to certain state criminal trespass laws, stated in the case of **Martin v. Struthers**, 319 U.S. 141, 147, 87 L.Ed. 1313, 63 S.Ct. 862:

> "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass

after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more. . . "

Appellee contends that a state's general laws literally must be applied to all with equal force, regardless of their race, color, creed or previous condition of servitude and that any violations thereof cannot and should not be shielded from an attempt to apply such laws simply because the violators consider themselves insulated therefrom because of their race. The application and enforcement of Florida Statute, Section 509.141, which, in the circumstances of this case, made appellants trespassers after notice, within the contemplation of Chapter 821, Florida Statutes (Section 821.01), most assuredly cannot be considered a type of state action proscribed by the Fourteenth Amendment even though the owners only reason for requesting appellants to leave may have been because they were negroes. See **Griffin v. Collins**, 187 F.Supp. 149. The restaurant's business policy of not serving negroes in conjunction with whites in its facility was, despite the protestations to the contrary, neither induced, declared or required by any state or local law, policy or custom. Nor was it in any way knowingly or appreciably aided by action that could legitimately be said to be that of the state.

Appellants were arrested and convicted for a criminal trespass, no portion of which was based upon Florida's wish or intention to have this purely private restaurant operate as a segregated dispenser of prepared foods.

Local law enforcement had thrust upon it the lawful and appropriate duty upon complaint being made by the

restaurant owner to act in such a fashion as to protect said owner's rights and insure that appellants' unlawful refusal to leave the premises did not place said owner in the position of having to resort to "self-help" in defense of his inalienable right to people his establishment only with those who suited his fancy. In so doing Florida was merely allowing the use of a salutary legal remedy as a more welcome substitute for unbridled force in a civilized community. The state certainly was not inducing others to discriminate. It certainly was not countenancing discrimination based upon race. It certainly was not making any moral judgment as to the respective rights involved. It certainly was not substituting its judgment for that of the individual owner. It was simply attempting to keep the peace and, perhaps more important, to prevent the explosive situation which will one day surely come to pass if an individual's rights to enjoy his property cannot be as lawfully protected as appellants here suggest their alleged rights should be.

The restaurant in question, despite the fact that it was licensed under Florida law and in some measure regulated and/or supervised by the Florida Hotel and Restaurant Commission, did not then and does not now operate as a quasi-public instrumentality of the state. Such license and/or regulation is peculiarly limited to the general right of a government to supervise eating establishments for purposes of public health, safety and sanitation. Such regulation certainly does not cloak this or any other restaurant in Florida with an aspect of quasi-public function, interest or ownership.

Finally, whatever may have been the restaurant manager's view as to the local custom, appellee respectfully submits that segregation and/or racial discrimination in Greater Miami, Florida, while it well may be a historical fact, is not now and was not then a matter which even the most rabid of newspapers cared to explore. Therefore it is quite incorrect and in fact a superhuman stretch of the imagination to conclude that "state action" coerced this restaurant to discriminate against appellants within the meaning of the Fourteenth Amendment.

## ARGUMENT

**THE SUBSEQUENT PARTICIPATION BY THE POLICE AND COURTS BELOW IN ARRESTING AND CONVICTING APPELLANTS FOR VIOLATING SECTION 509.141, FLORIDA STATUTES, DID NOT CONSTITUTE STATE ENFORCEMENT OF LY, A DENIAL OF APPELLANTS' RIGHTS TO RACIAL DISCRIMINATION AND, CONSEQUENTTHE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT.**

With admirable candor appellants concede that here they do not assail their conviction on the theory that there was insufficient evidence to support their conviction as in the case of **Garner v. Louisiana**, 368 U.S. 157, 7 L.Ed.2d 207, 82 S.Ct. 248 (1961). They likewise concede that the statute in question does not require racial segregation in restaurants as was the case of **Peterson v. City of Greenville**, 373 U.S. 244, 31 Law Week 4475 (1963). Terminally they concede that the issue of interstate commerce, as was in the

case of **Boynton v. Virginia**, 364 U.S. 454, 5 L.Ed.2d 206, 81 S.Ct. 182 (1960), is not here involved.

Appellee agrees that this is so.

At common law, a citizen engaged in or operating an enterprise with a public calling or flavor such as an innkeeper or common carrier was held to be under an unqualified duty to the general public and was obligated to serve, without discrimination, all who sought his service. It is, however, equally well settled that owners and/or operators of purely private enterprises, including, of course, restaurants, are under no such common law obligation; and, in the absence of any statute forbidding discrimination (as is the case in Florida) may select their invitees and/or clientele without regard to rhyme or reason and, if the Court please, based upon color if they so desire. **Williams v. Howard Johnson's Restaurant**, supra; **Slack v. Atlantic White Tower System, Inc.**, 181 F.Supp. 124, aff. 284 F.2d 746; **Griffin v. Collins**, supra; **Madden v. Queens County Jockey Club**, 72 N.E.2d 697 (New York), cert. denied, 332 U.S. 761; **Terrell Wells Swimming Pool v. Rodriquez**, 182 S.W.2d 824 (Texas); **Younger v. Judah**, 19 S.W. 1109 (Missouri); **Goff v. Savage**, 210 P. 374 (Washington); **De La Ysla v. Publix Theatres Corporation**, 26 P.2d 818 (Utah); **Horn v. Illinois Central Railroad**, 64 N.E. 2d 574 (Illinois); **Coleman v. Middlestaff**, 305 P.2d 1020 (California); **Fletcher v. Coney Island**, 136 N.E. 2d 344 (Ohio); **Alpaugh v. Wolverton**, 36 S.E. 2d 906 (Virginia); **Greenfeld v. Maryland Jockey Club**, 190 Md. 96; **Good Citizens Assoc. v. Board**, 217 Md. 129; **Drews v. State**, 224 Md. 186; **Garfine v. Mon-**

**Monmouth Park Jockey Club**, 148 A.2d 1 (N.J.); and **State v. Clyburn**, 101 S.E.2d 295 (N.C.).

Even this very Court in **Boynton v. Virginia**, supra, clearly recognized the applicability and validity of the foregoing principles when it concluded that every time a transstate bus stops at a wholly independent roadside restaurant not even the Interstate Commerce Act required that eatery to provide service in harmony with the provisions of that act. In point of fact this Court has even refused to hold that where a privately owned restaurant is invovled; in the absence of the general tax paying public's ownership of or interest in the facility, in interstate commerce that it will extend federal protection by judicial fiat against racial discrimination on the basis of the Fourteenth Amendment. **Burton v. Wilmington Parking Authority**, 365 U.S. 715, 6 L.Ed.2d 46, 81 S.Ct. 856 (1961); **Boynton v. Virginia**, supra.

Such recent pronouncements as these can certainly be considered no less than a judicial reaffirmance of the long-established law that the owner of private property may be arbitrary and capricious in his choice of invitees, not withstanding the Fourteenth Amendment; and that said amendment "erects no shield against merely private conduct, however discriminatory or wrongful." **Shelley v. Kraemer**, supra, and **Terminal Taxicab Company v. Kutz**, 241 U.S. 252.

In further accord with the aforesaid, it appears that appellants complain that it is inaccurate to state that this

was private action on the part of the restaurant owner but rather that it was in fact "state action" from its very inception. It seems that appellants might be willing to concede that even if the private owner had the right to exclude them from his premises solely on account of their race that the State of Florida invaded the area of forbidden conduct mapped by the Fourteenth Amendment when it arrested, prosecuted and convicted them under the statute in issue. This is, of course, further sought to be buttressed by the reference to the fact that the Attorney General is now appearing of counsel for the appellee. Lest there be any misunderstanding among the parties properly concerned in this case, the responsibilities of the Office of the Attorney General of the State of Florida, which include the mandatory representation of the state in all criminal appeals, may be found in Chapter 16, Florida Statutes. The provisions to be found in said chapter are legislative amplifications of the Constitution of the State of Florida relating to the Office of the Attorney General and his duties. See Article IV, Section 22, Florida Constitution.

A greatly similar if not in fact identical argument was advanced and rejected in the case of **Griffin v. Collins**, supra, the holding of the Court there being:

> "Plaintiffs have cited no authority holding that in the ordinary case, where the proprietor of a store, restaurant or amusement park, himself or through his own employees, notifies the Negro of the policy and orders him to leave the premises, the calling in of a peace officer to enforce the proprietor's admitted right would amount to deprivation by the state of any

rights, privileges or immunities secured to the Negro by the Constitution or laws. **Granted the right of the proprietor to choose his customers and to eject trespassers, it can hardly be the law, as plaintiffs contend, that the proprietor may use such force as he and his employees possess but may not call on a peace officer to enforce his rights.**" (Emphasis supplied)

Appellee concedes that "state action" which prompts, urges, suggests or advocates racial segregation both is and should be proscribed by the Fourteenth Amendment. However, appellee is just as quick to state categorically that Florida has never at any stage of these proceedings entered upon any "state action" much less that of the type which would coercibly, and hence unconstitutionally, be applied to enforce and abet racial discrimination simply by its act in arresting, prosecuting and convicting appellants in the circumstances of this case.

One fact must be borne in mind if all others are put aside, that is that the private decision to discriminate against appellants because of their race had already been terminally made by the manager of the restaurant and it was only upon appellants failure to leave that the police were asked to arrest them as violators under a valid legislative enactment, Section 509.141, supra. Would it not be folly to suggest that once having organized a system of legal redress and/or remedies, which system is presumed to be available to all citizens, that one such citizen seeking to enjoy his property in a manner which pleases him—albeit in opposition to the feelings of others, is not free to call upon this system in order that he might continue to enjoy rights

which are his? Must he take it upon himself to evict parties whom he does not want upon his premises and by so doing subject himself to all which may flow therefrom or is he free to call for aid upon the law enforcement which his taxes support and which he is urged to use when and if it becomes necessary in the course of events?

If the doctrine of "self-help" is to be his only alternative, then surely it would not be unconstitutional for a Florida legislative enactment to grant him and others so situated a valid defense to a charge which might arise from his wish to evict unwanted individuals. If the only way he can preserve his right is to do it himself, then it would be manifestly unfair to subject him to certain criminal prosecution stemming from his physical efforts to rid himself and his establishment of parties he does not wish to serve.

Is it not infinitely more correct and perforce compelling to note that all private choice must of necessity depend for its survival (if there is to be any) upon the majesty and rightful support of sovereign sanctions. Appellee considers this concept so clear and incapable of generating disagreement, that it would be a wonder to hear one voiced.

In this case the Greater Miami law enforcement which was importuned to keep the peace and, if necessary, to enforce the law, was, by so acting, totally color-blind. Not being shouldered with the responsibility of making a moral judgment which might one day be required to satisfy the protagonist of liberality, the arresting officer simply noted that after having been asked to leave by the proprietor

that appellants refused to comply with that request, whereupon they became violators of the law and as such the proper subjects of his power, nay duty to arrest for said violation.

Quite unlike the situation which might be said to have existed in **Griffin, et al. v. Maryland,** No. 6, Oct. Term, 1963, the State of Florida never delegated or attempted to delegate its authority to arrest a person who violated a valid state law.

The State of Florida here quite correctly confined its police authority to officers of the law acting independently of any connection with the wishes, motivations, orders or hopes of the restaurant—because of which they only intervened (for the very first time) after the restaurant's purely private decision to treat appellants as trespassers after notice and they had been asked to leave and had refused. While the ultimate effect, insofar as appellants are concerned might be said to be similar, we consider that it follows that the police action in arresting appellants in this case must be viewed as color-blind.

Whatever view one may take of the propriety of this Court's decision in the case of **Shelley v. Kraemer,** supra, it is at least incorrect to suggest, nay urge, that the pronouncements to be found therein control the situation here either totally or in part. The differences between the cases should be readily apparent—discrimination was **required** in the **Shelley** case, supra, and here is only the result of an individual's free choice unfettered by any state laws prohib-

iting it, any restrictive covenants, or any other legal or purportedly legal, like restrictions.

Also quite unlike **Valle v. Stengle**, 176 F.2d 697 (3rd Cir., 1949), we have here no state law such as that which was abridged by the amusement park in that case. Nor do we have an abridgment of a right to enforce contracts such as we did in **Shelley v. Kraemer**, supra, for here the management of the restaurant simply did not wish to contract with appellants.

Said another way, we pose this question: would this Court's decision in **Shelley v. Kraemer**, supra, have been the same if the property owner who had sought to convey his property to Shelley (as was actually the case) had refused to sell it to Shelley? We think the answer must of course be no. The inescapable reason therefor is that Shelley concerned the refusal, by state action of the Courts of Missouri to specifically require performance on the contract which had already been executed. Could it be said that this Court would have required a property owner among the group of covenantees in Shelley—they being independent owners thereof, to sell to anyone much less a negro if it did not suit them to do so. It is therefore not correct to say that the restaurant here is in the same position by virtue of the police arrest as was the Missouri Supreme Court in honoring the restrictive covenant which sought to unlawfully limit the scope of the covenantees in the disposition of their property.

This Court's decision in the **Shelley** case, supra, was not

a commandment that owners of property must sell to negroes without regard to their wishes. It was instead a commandment that once a property owner elects (of his own free will) to sell to a negro that the state cannot in any way marshall its forces so as to effectively denude the purchaser's right to have and enjoy that property.

Repeating, if this Court would not have required the seller in Shelley to in fact sell when he did not choose to, then how can it reasonably be urged that Shell City Restaurant here could be required to serve the negro if it did not choose to.

## II.

## SHELL CITY ACTION IN DECLINING TO SERVE APPELLANTS DID NOT CONSTITUTE SUCH STATE ACTION AS IS CONTEMPLATED BY THE FOURTEENTH AMENDMENT DESPITE THE FACT OF THE LICENSING LAW, CHAPTER 509, FLORIDA STATUTES, OR ANY REGULATIONS PROMULGATED THEREUNDER.

It is respectfully urged that Shell City's action in declining to serve appellants, even if based on race alone, was no more than private action wholly independent of any connection with the state, its laws, police or courts.

The mere fact that Chapter 509, Florida Statutes, addresses itself to the general area involving the licensing of restaurants in the State of Florida is no basis whatever upon which to conclude that in fact there is such inter-

dependence as to make Shell City's actions those of the state.

Carrying appellants' reliance upon the licensing provisions to its logical conclusion, would it not follow as a matter of course that simply because there is extensive legislation in Florida regulating motor vehicles and their use—the scope of which may be found between the pages of 4311 through 4328 in Volume 3, the index to Florida Statutes, 1961, that it would constitute state action if a state employee refused to accept a negro as a member of a car pool in the office?

Would it likewise not be true that simply because real estate brokers are extensively controlled by law in Florida—the scope of which may be found between pages 4457 through 4460 in Volume 3, the index to Florida Statutes, 1961, that it would constitute state action if a salesman or broker refused to sell a home or a plot of land to a negro? Would it further not follow simply because of the homestead exemption law—the scope of which may be found in Article X of the Florida Constitution and in Sections 192.113, 192.12, 192.13, 192.14, 192.141, 192.15, 192.16, 192.161, 192.17, 192.18, 192.19, 192.20, 192.201; 222.01, 222.02, 222.03, 222.05, 222.06, 222.08, 222.09, 222.10; 253.25, 253.35, 253.351, 253.352, 253.353, 253.354, 253.355, 253.356; 731.05 and 731.27, that an individual citizen of the State of Florida could not, without engendering state action that is, lawfully refuse a negro permission in his home.

While the answers to the above are obvious, appellants'

blithely skip over this by concluding that there is no need to speculate as to such matters in this case without giving any real reason therefor. Yet they do not hesitate to adopt as the rationale for a portion of their argument here the logic, an extension of which (see above) compels the same conclusion be reached with reference to the three areas specifically mentioned above. How convenient it would be, for appellants that is, if the logic could be cut off at their whim.

Adverting again to **Valle v. Stengle**, supra, it would seem that what appellants seek is not only the right to enforce contracts (see **Shelley v. Kraemer**, supra) once already formalized, but as well a guarantee that their wish, to contract will produce a like wish in an individual privately situated in a business house. They had in fact, at least in this case, the right to contract; that is to say, that they entered the premises and asked to be served. Their offer to spend their money in this restaurant was rejected by the proprietor because he did not wish to contract with them. This Court is now asked not only to enforce the contracts made the object of **Shelley v. Kraemer**, supra; not only to assure the right to contract made the object of **Valle v. Stengle**, supra, but now to act as judicial guarantors that a contract will be effected. If that be their wish, then one must wonder at the origin of their authority therefor.

Many years ago this Court rendered its opinion in **The Civil Rights Cases**, supra. In this decision the Court observed without qualification that the national Congress was

powerless to legislate against such private discrimination as may be said to be involved in the present case. This Court cannot (without overruling such prior precedents) accomplish the same result by now holding that the Fourteenth Amendment to the United States Constitution only now creates a new limitation and/or restriction upon the use of private property as has been developed for lo these many years. Would it not be odd to suggest that that which this Court found so offensive in the legislation made the object of its judicial condemnation in the civil right cases may now manifest itself in a judicial fiat (this Court's) not itself subject to the same approbation. It was the object of the legislation which this Court criticized in the civil rights cases at least as much as it was the attempt to legislate thereon. Just as surely would that be so here.

The mere fact that the restaurant was required to have a license in order to operate does not, as contended by appellants, prohibit discrimination by the private owner either as to its use or enjoyment; nor does the licensing requirement automatically work to convert such a private facility into a public one. See **Williams v. Howard Johnson's Restaurant**, supra; **Slack v. Atlantic White Tower System, Inc.**, supra; **Madden v. Queens County Jockey Club, Inc.**, supra; **State v. Clyburn**, supra. See also **Griffin v. Collins**, supra.

Ultimately appellants merely seek to impress upon this Court the need for a social adjustment so as to more nearly limn what some maintain should be our image—at least internationally. Intertwined within the entire argument

may be found a common thread, to-wit: not only should no such action (as here) result from either appellants' actions or others similarly inclined but that in fact the nation's future sit-ins should be free to operate under the imprimatur of a state blessing and in fact with state protection and encouragement—especially if they happen to be negroes. If this be so, it doth appear that the thrust of their argument descends to a claim that the right of an individual owner of a private business to determine who his customers will be is lost whenever his choice is based upon his disinclination to serve a particular racial group and that the ordinary trespass which (at least up until now) insured peaceful possession is nugatory when the owner's decision is based upon race. Would this Court assist appellants in their attempt to deprive the private property owner of his individual right to decide just who he shall have on his premises and by so doing, literally require him to fend for himself—when the members of a race with whom he does not wish to do business take the law into their own hands (on his private property) and intentionally commit a trespass thereon?

Morals had never had their origin in the law. Quite the contrary, the law was born of an assortment of moral codes and the law simply codifies such concepts. The initial murder was not bad because a court said it was bad but it ultimately became the object of prohibiting laws when a sufficient number of humans were morally revolted thereby. But there could be no judicial condemnation of murder even then without the law and its condemnation thereof.

Just as surely there could have been no legal condemnation without the moral force which prompted it. It well may be that one day man will not be cruel to his fellow man. It well may be that we will all one day walk in the image of God. It even may be that the day will come when the need for this or any other court will no longer exist. Whatever one's view may be of the aforesaid, it would appear to follow that until something less formidable than man's disinclination to be as moral as some would have him be looms upon the scene, man will be no better or worse than he ought to be. Just as prohibition failed miserably in its attempt to legislate morals so would a judicial condemnation here fail to make man moral when he chooses not to be.

Unlike the other cases which this Court will consider in conjunction with the instant case, there is here presented without any of the trappings to be found in those cases, the pure question of which individual's rights shall be paramount and why. Shall it be as appellants' contend, their right to be served wherever they please without regard or shall it be as the appellee contends, a right (theirs) to be so accommodated only if and when the individuals of whom they seek such accommodation are inclined to barter it away for money? We say again they cannot avail themselves of **Shelley v. Kraemer**, supra, to claim that they have a right to enforce something. Nor may they bottom their claim on **Valle v. Stengle**, supra, so as to urge that they have a right to contract. Instead, they seek to create a new right; nay a guarantee that when and if they, as individuals, choose to contract that the individuals with whom

they choose to contract no longer have any choice in the matter but must, by dint of this Court's law, accede to their wishes.

Viewed in such a light, and so it must be viewed, appellee must at once wonder at how appellants would consider themselves immune from the obvious result. That is to say that if we diminish the rights of one group of individuals in favor of those of another, then all suffer an irreplaceable loss as they (rights) would all become, at one time or another, nothing more than the whims of a given group at a given time.

## CONCLUSION

Appellee, because of the foregoing reasons, urges the Court to affirm the action of the Florida Supreme Court as to all of the appellants.

Respectfully submitted,

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## PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Brief of the Appellee to the Honorables Alfred I. Hopkins, Tobias Simon and Howard W. Dixon, Counsel for the appellants, 223 Southeast First Street, Miami, Florida, by mail, this ..... day of September, 1963.

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Of Counsel for the Appellee.